Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - Plaintiff,

versus

COMMONWEALTH OF KENTUCKY, - Defendant.

EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE REPORT OF THE SPECIAL MASTER FILED JANUARY 22, 1979

AND

BRIEF IN SUPPORT OF EXCEPTIONS

ROBERT F. STEPHENS
Attorney General
Capitol Building
Frankfort, Kentucky 40601

JAMES M. RINGO
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Defendant

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

INDEX

PAGE

Table of Authorities ..... iii–iv

Exceptions of the Commonwealth of Kentucky to the Report of the Special Master Filed January 22, 1979 ..... 1– 2

Brief of the Commonwealth of Kentucky in Support of Exceptions to the Report of the Special Master Filed January 22, 1979 3–33

Introduction 3

Questions Presented 3– 4

Statement of the Case 4– 5

Historical Background 5– 8

Argument 8–32

I. The Northern Boundary of Kentucky Along the Ohio River Is the Northerly Low Water Mark as It Presently Exists and as It May Change Through the Processes of Accretion and Erosion 8–29

A. The Report Is Erroneous in Concluding as a Matter of Law That the 1792 Low Water Mark on the Northerly Side of the Ohio River Is the Boundary Line Between Kentucky and Ohio.. 8–13

B. The Report Errs in Failing to Consider the Critical Distinction Between Accretion and Avulsion 13–15

C. The Report Disregards the Clear Intention of Virginia, Manifested by This Court's Decision in *Handly's Lessee* v. *Anthony*, 18 U. S. (5 Wheat.) 374 (1820), to Retain the River as a Natural Boundary Subject to the Principles of Accretion and Erosion 15–19

PAGE

D. The Report Incorrectly Holds That *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), is Controlling on the Issue in This Case 19–22

E. The Law of Accretion and Erosion Is Applied to Rivers Which Are Natural Boundaries as a Rule of Convenience 22–24

F. The Erection of Artificial Structures Including Locks and Dams Does Not Constitute an Avulsion and Does Not Alter Application of Principles of Accretion and Erosion 25–29

II. Legislative Acts Conclusively Demonstrate That the Boundary Between Kentucky and Indiana Is the Current Low Water Mark on the Northern Side of the Ohio River; Ohio's Claim, Based Entirely on the Status of Kentucky's Boundary With Indiana, Must Be Rejected as a Matter of Law 29–32

Conclusion 32–33

Appendix 35–39

Certificate of Service 40

TABLE OF AUTHORITIES

Cases

PAGE

Arkansas v. *Mississippi*, 250 U. S. 39 (1919) 9

Arkansas v. *Mississippi*, 252 U. S. 344 (1920) 9

Arkansas v. *Tennessee*, 246 U. S. 158 (1918) 9, 11

Arkansas v. *Tennessee*, 397 U. S. 91 (1970) 9

Beaver v. *United States*, 350 F. 2d 4 (9th Cir. 1965), *cert. denied*, 383 U. S. 937 (1966) 26

Bonelli Cattle Co. v. *Arizona*, 414 U. S. 313 (1973) ...12, 26

County of St. Clair v. *Lovingston*, 90 U. S. (23 Wall.) 46 (1874) 26

Handly's Lessee v. *Anthony*, 18 U. S. (5 Wheat) 374 (1820) 15, 16, 17, 18–19, 23–24

Indiana v. *Kentucky*, 136 U. S. 479 (1890) 19, 20, 31

Indiana v. *Kentucky*, 163 U. S. 520 (1896) 31

Iowa v. *Illinois*, 147 U. S. 1 (1893) 9

Leo Sheep Co. v. *United States*, No. 77-1686 (Decided March 27, 1979) 16

Louisiana v. *Mississippi*, 282 U. S. 458 (1931) 9

Missouri v. *Kentucky*, 78 U. S. 395 (1871) 9, 15

Missouri v. *Nebraska*, 196 U. S. 23 (1904) 9, 10

Nebraska v. *Iowa*, 143 U. S. 359 (1892) 9, 14

New Orleans v. *United States*, 35 U. S. (10 Pet.) 662 (1836) 10

Ohio v. *Kentucky*, 410 U. S. 641 (1973) 4

Oklahoma v. *Texas*, 268 U. S. 252 (1925) 9

Oregon ex rel. State Land Board v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977) 27

Pollard's Lessee v. *Hagan*, 44 U. S. 212 (1845) 26

Purvine v. *Hathaway*, 238 Ore. 60, 393 P. 2d 181 (1964) 24, 28

United States v. *Claridge*, 416 F. 2d 933 (9th Cir. 1969), *cert. denied*, 397 U. S. 961 (1970) 26, 26–27

Vaughn v. *Foster*, 20 Ky. L. R. 682, 47 S. W. 333 (1898) 20

Statutes

PAGE

1 Laws of the United States 472 (1784) 6
1 Laws of the United States 673 (1789) 6
1 Stat. 189 (1791) 6
1 Stat. 50 7
2 Stat. 58 7
2 Stat. 173 (1802) 7
57 Stat. 248 (1943) 32
1943 Ind. Acts, Ch. 2 31
1942 Ky. Acts, Ch. 116 30

Other Authorities

72 Am. Jur. 2d, *States, Territories & Dependencies*, §§27, 28 9
Gould on Waters, §155 (1883) 9
I. Hyde, *International Law*, §138 (1945) 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - *Defendant.*

EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE REPORT OF THE SPECIAL MASTER FILED JANUARY 22, 1979

Pursuant to the Court's order,* the Commonwealth of Kentucky ("Kentucky") excepts to the Report of the Special Master filed January 22, 1979, and specifically to Recommendations 1) and 2) contained therein, as follows:

1. Kentucky excepts to the conclusion that the boundary between the State of Ohio ("Ohio") and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in

*On January 22, 1979, the Court ordered the Report of the Special Master received and filed. The Court directed that exceptions, if any, and supporting briefs were to be filed within 45 days. Mr. Justice Stewart extended the time for filing exceptions until March 23, 1979 and on March 19, 1979 said filing period was again extended by order of this Court to April 6, 1979. The Special Master's Report will be referred to herein as "Report."

the year 1792 and not the low-water mark on the northerly side as it exists today.

2. Kentucky excepts to the conclusion that application of principles of acquiescence and prescription preclude Kentucky's claim that the boundary between Ohio and Kentucky is the present low water mark on the northerly side of the Ohio River.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

JAMES M. RINGO
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Defendant

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - *Defendant.*

BRIEF OF THE COMMONWEALTH OF KENTUCKY IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED JANUARY 22, 1979

INTRODUCTION

The Commonwealth of Kentucky, having filed exceptions to the Report of the Special Master, submits this brief in support of those exceptions. A discussion of the basis of the exceptions will be first set forth to be followed by recommendations as to the remedy to be fashioned by this Court.

QUESTIONS PRESENTED

I. Whether the northern boundary of Kentucky along the Ohio River is the northerly low water mark as it presently exists and as it may change through the processes of accretion and erosion.

II. Whether legislative acts conclusively demonstrate that the boundary between Kentucky and Indiana is the current low water mark on the northerly side of the Ohio River, precluding application against Kentucky of principles of acquiescence and prescription based on said boundary.

STATEMENT OF THE CASE

This original action was instituted by the State of Ohio against the Commonwealth of Kentucky in March, 1966, to contest the boundary between the states along the Ohio River.

On March 3, 1973, this Court rejected the claim of Ohio that the boundary is in the middle of the river, and held rather that it is the low water mark on the northerly side. *Ohio* v. *Kentucky,* 410 U. S. 641. That left for consideration the competing legal contentions of Kentucky that the boundary is the present low water mark and of Ohio that the boundary is the 1792 low water mark. It also left for consideration an issue of jurisdiction of these two states over the river. The current stage of the proceedings involves only establishing the law for resolving the boundary issue.

Following remand to the Special Master after the 1973 decision, Kentucky and Ohio entered into a stipulation approved by the Special Master for submission on the sole issue as to whether as a matter of law the boundary could be adjudged as the 1972 or present low water mark.[1] The operative portions of the stipulation were in the first three paragraphs:

[1]Preliminary resolution of this issue as a matter of law is consistent with the policy noted in the 1973 opinion in favor of such determinations in cases of this kind to save time and expense.

1. In its complaint the State of Ohio alleged that the boundary line between the two States is the low water mark on the northerly side of the Ohio River as it existed in the year 1792;

2. In its answer the Commonwealth of Kentucky alleged that the boundary line is the low water mark on the northerly side of the Ohio River as it exists today;

3. The parties, believing that a decision as to which of these two lines is the boundary can be reached as a matter of law, have agreed to submit that question to the Special Master on briefs; Report, p. 18-19.

The parties submitted briefs to the Special Master, and he filed his Report containing his recommendations on January 22, 1979.

Kentucky contends that the first portion of the Report's conclusions is based on an erroneous interpretation and application of the law. Kentucky contends that the second portion concerning acquiescence and prescription is conclusively refuted by legislative acts.

These two basic exceptions to the Report, and the underlying considerations they involve, will be taken up seriatim in the Argument.

HISTORICAL BACKGROUND

At the time of the Revolutionary War the Commonwealth of Virginia owned or claimed all of the land which now comprises the Commonwealth of Kentucky and the land northwest of the Ohio River including Ohio. In the year 1784, the State of Virginia executed

a deed of cession conveying to the United States all of its territory including in the following description:

> . . . by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefits of the said States, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio, . . . 1 Laws of the United States 472, 474 (1784).

This grant by Virginia is known as the Cession of Virginia. It is clear from the language of the Cession that the Commonwealth of Virginia reserved to herself all of the rights of ownership and possession of the Ohio River which she had previously enjoyed.

Virginia also reserved to herself ownership of the land now comprising the Commonwealth of Kentucky, and on December 18, 1789, by Act of the General Assembly of Virginia, it was decided that the then "District of Kentucky" be formed into an independent state. *See* 1 Laws of the United States 673 (1789). Pursuant to this Act, known as the Virginia-Kentucky Compact, the boundaries of the Commonwealth of Kentucky were established as the same as those of the District of Kentucky. I Laws of the United States 673, 674 (1789). In admitting Kentucky to statehood, Congress adopted as the new state's boundaries those of the District of Kentucky as they existed on December 18, 1789. 1 Stat, 189 (1791). Kentucky officially became a state on June 1, 1792, thus succeeding under the

Virginia-Kentucky Compact to all the rights of Virginia, whatsoever those rights might be, with respect to ownership and possession of the Ohio River.

Ohio, as Indiana,[2] received its territory from the United States. On August 7, 1789, Congress passed "an Act to provide for the Government of the Territory Northwest of the river Ohio." 1 Stat. 50. In 1800, this territory was divided into two separate governments. 2 Stat. 58. And on April 30, 1802, the enabling Act for the admission of Ohio was passed. 2 Stat. 173. Ohio was thus formed out of the eastern half of the previously divided territory and was "bounded . . . on the South by the Ohio River." The land in the eastern division not included within the boundaries described for Ohio was "attached to, and made a part of the Indiana territory." *Id.*, at 174.

The Commonwealth of Kentucky has always claimed and now claims that the boundary between it and the State of Ohio is the present low water mark on the northerly side of the Ohio River, wherever that may be from time to time subject to the natural processes of accretion and erosion. The State of Ohio, on the other hand, now claims that the boundary line between

---

[2]Reference to Indiana is relevant and helpful in view of the previous decisions of this Court respecting the Kentucky-Indiana boundary along the Ohio River. On the 16th of April, 1816, Congress passed an Act to enable the people of the Indiana territory to form a state government, in which the boundaries of the proposed state were distinctly prescribed as provided under the Virginia Cession of 1784, and among them, that it should be bounded "on the south by the river Ohio, from the mouth of the Great Miami river to the mouth of the river Wabash." Indiana was admitted into the Union by a joint resolution of Congress, approved December 16, 1816, acquiring thereby no other or greater rights either as to soil or jurisdiction, than the United States had acquired under the Cession from Virginia.

it and Kentucky is the northerly low water mark of the Ohio River as that mark existed in the year 1792, when Kentucky was admitted into the Union.

ARGUMENT

I. THE NORTHERN BOUNDARY OF KENTUCKY ALONG THE OHIO RIVER IS THE NORTHERLY LOW WATER MARK AS IT PRESENTLY EXISTS AND AS IT MAY CHANGE THROUGH THE PROCESSES OF ACCRETION AND EROSION.

A.

The Report Is Erroneous in Concluding as a Matter of Law That the 1792 Low Water Mark on the Northerly Side of the Ohio River Is the Boundary Line Between Kentucky and Ohio.

The issue in this case is whether the boundary line between the two states is the northerly low water mark as it existed in 1792 (a static, inflexible and unchanging line) or the present low water mark (a natural and shifting line subject to accretion and erosion). By stipulation of the parties, the issue was submitted to the Special Master on briefs to determine whether it could be decided solely as a matter of law.

The Report completely ignores well-settled principles of law concerning river boundaries, established for centuries at common law and by longstanding decisions of this Court. It errs in concluding as a matter of law that what was intended as a natural river boundary was fixed in perpetuity as a specific line

formed by the precise location of the northerly river edge at its low water mark in 1792.

The Report fails to consider the traditional accretion-avulsion distinction which is critical in resolving river boundary disputes, including the present controversy. The failure to apply established Federal common law to this interstate boundary dispute is a fatal omission and this ground alone requires rejection of the Report.

From the days of the Romans to the present date, the rule adopted by virtually every system of jurisprudence[3] to determine boundaries formed by a body of water, whether public or private, is that the boundary will follow changes in the shoreline, unless those changes are sudden or avulsive. *Gould on Waters,* §155 (1883); I. Hyde, *International Law,* §138 (1945); 72 Am. Jur. 2d, *States, Territories & Dependencies,* §§27, 28. This rule has been recognized and repeatedly applied by this Court to determine interstate boundaries throughout the United States since our country's earliest days. *Arkansas* v. *Tennessee,* 397 U. S. 91 (1970); *Louisiana* v. *Mississippi,* 282 U. S. 458 (1931); *Oklahoma* v. *Texas,* 268 U. S. 252 (1925); *Arkansas* v. *Mississippi,* 252 U. S. 344 (1920); *Arkansas* v. *Mississippi,* 250 U. S. 39 (1919); *Missouri* v. *Nebraska,* 196 U. S. 23 (1904); *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918); *Nebraska* v. *Iowa,* 143 U. S. 359 (1892); *Iowa* v. *Illinois,* 147 U. S. 1 (1893); *Missouri* v. *Kentucky,* 78 U. S. 395 (1871).

---

[3] *Nebraska* v. *Iowa,* 143 U. S. 359, 364 (1892).

A closer examination of a few of these cases reveals that the federal rule is and always has been in accord with the traditional accretion doctrine. The rule was clearly set out by this Court in *New Orleans* v. *United States,* 35 U. S. (10 Pet.) 662 (1836). In that case this Court held that:

> [t]he question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. . . . 35 U. S. at 717.

This rule was the basis of the decision in *Missouri* v. *Nebraska,* 196 U. S. 23 (1904), an original suit brought by Missouri to establish the boundary between the two states along the Missouri River. Under the terms of its admission to the Union on March 6, 1820, Missouri's western boundary was established as "the middle of the Mississippi." The dispute in that case involved a piece of land called McKissick's Island. This "island" had formerly been a part of the Nebraska Territory mainland but within a twenty-four hour period had been cut off from that mainland by a sudden change in the course of the Missouri River. The dispute between Missouri and Nebraska was whether this change, which left the island on the Missouri side

of the river, affected the boundary between the two states. This Court discussed the general rule of accretion-avulsion and applied it to the facts at hand:

> We perceive no reason to believe that Congress intended, either by the facts of 1820 and 1836 relating to Missouri, or the act admitting Nebraska into the Union, to alter the recognized rules of law which fix the rights of parties where a river changes its course by gradual, insensible accretions, or the rules that obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed. 196 U. S. at 37.

The rule was again applied by this Court in *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918). Under the terms of the Treaty of 1763 between England, France and Spain, the boundary between France and Great Britain was established as "a line drawn along the middle of the River Mississippi." After the Revolutionary War the State of North Carolina succeeded to the rights of Great Britain to the territory east of the Mississippi and adjacent to the State of North Carolina. North Carolina then ceded to the United States in 1790 the area now comprising the State of Tennessee. Thus, Tennessee then succeeded on its admission to the Union to a boundary established as the middle of the Mississippi River. The disputes before this Court were whether an avulsive change could alter the boundary between the states of Arkansas and Tennessee and whether the middle of the river meant a point equi-

distant from each bank or a point in the middle of the navigable channel.

Applying the traditional doctrine this Court found that:

> [i]t is settled beyond the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. 246 U. S. at 173.

The Court continued:

> The true boundary line between the states, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783 [8 Stat. at L. 80], subject to such changes as have occurred since that time through natural and gradual processes. 246 U. S. at 177.

The federal rule was recently reaffirmed in *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973), in which this Court found that "[r]iparian land is at the mercy

of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control." *Id.* at 326.

B.

The Report Errs in Failing to Consider the Critical Distinction Between Accretion and Avulsion.

It is clear that under the traditional accretion rule as applied by this Court the river boundary between Kentucky and Ohio is a wandering boundary, not an unswerving line, and when through the natural and gradual processes of erosion or accretion, the low-water mark is changed, the boundary follows the change. Therefore, the boundary between the two states will not become fixed and unchanging unless there has been an avulsive change in some part of the Ohio River which results in exposure of dry land where a line must be fixed as on any other land boundary.

Generally speaking, an avulsion occurs when there has been some violent and sudden change in the bed of a river:

> But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates. *Gould on Waters,* §159.

Thus, an avulsion could occur in two situations: (1) where the main channel of a river shifts abruptly from

one location to another, or (2) when an identified, stable land area finds itself on the "other" side of what would normally be the boundary. The so-called "island rule.")

For example, in the case of *Nebraska* v. *Iowa,* 143 U. S. 359 (1892), the Court was faced with a dispute arising out of a change in the Missouri River wherein the river suddenly cut through the neck of the ox-bow and created a new channel. This Court held that this change in the channel constituted an avulsion and thus the old boundary remained intact, stating:

> With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in the process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable, in the successive moments of its progression.
>
> But, on the other hand, if, deserting its original bed, the river forces for itself a new channel, in another direction, then the nation, through whose territory the river thus breaks its way, suffers

> injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. 143 U. S. at 36 L. Ed. 186, 188.

In *Missouri* v. *Kentucky,* 78 U. S. 395 (1871), the same principles were applied in determining whether the main channel of the Mississippi River had always flowed to the east or the west of Wolf Island. The Court found that the river had always flowed to the west of the island in the past and had then changed its channel so that the river flowed to the east of the island, and thus determined that the present change was avulsive in nature. The change did not therefore disturb the boundary between the two states and the island remained, as always, a part of Kentucky.

It is clear, then, that the boundary between Kentucky and Ohio is the *present* northerly low-water mark of the Ohio River and is an unchanging and fixed boundary only with respect to those areas in which an avulsive change has occurred.

C.

The Report Disregards the Clear Intention of Virginia, Manifested by This Court's Decision in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), to Retain the River as a Natural Boundary Subject to the Principles of Accretion and Erosion.

The Ohio River is a natural, everchanging boundary, subject to the federal common law principles of accretion and erosion.

Not only did the Report ignore well-established principles of law, which this Court has constantly followed in disputes of this nature, but failed to recognize the clearly stated intention of Virginia, in retaining the river as its northerly boundary, to establish the river as a natural and everchanging boundary. Kentucky's boundary on the Ohio River is clearly a boundary to which this rule of federal common law would apply.

When Virginia retained the river as its boundary between the District of Kentucky and the wilderness territory north of the river, she certainly did not intend that the low-water line be indelibly etched in the bed of the river. The Cession of Virginia contained no such provision. Such intention must be affirmatively set forth in the grant and cannot be implied where the grant is silent. *Leo Sheep Co.* v. *United States,* No. 77-1686 (Decided March 27, 1979). A static boundary would have served no purpose. There was no need for a static and fixed line. The river itself marked the outer limits of territory retained by Virginia in its cession to the United States and marked the beginning of the frontier lands which were later to be formed into states.

The river served as a natural boundary and Virginia obviously retained it for that purpose. In addition, the river had great value for navigational and fishing purposes and served as a natural protective barrier from the unsettled wilderness north of the river.

This Court in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), clearly recognized Virginia's intention to retain the river as a natural boundary.

Handly involved an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant from the United States, as being part of Indiana. The dispute was over a neck of land which was separated from the mainland of Indiana by a channel or bayou which had formed north of the main river. When the river was high, the bayou or channel filled and the land was cut off from Indiana. When the water was low, the channel was dry in part and formed a peninsula. The resolution of the dispute depended upon whether the land was in Indiana or Kentucky. The Court stated that the answer to this question depended chiefly on the land law of Virginia, and on the cession made by that State to the United States.

In *Handly, supra,* at page 379, the Court stated:

> In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being, to the north-west of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent states. *These states, then, are to have the river itself, wherever that may be, for their boundary.* This is a *natural boundary,* and in establishing it, Virginia must have had in view the *convenience of the future population of the country.*
>
> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting

> it, each holds to the middle of the stream. *But when as in this case, one state is the original proprietor, and grants the territory to one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary.* . . .
>
> . . . Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark (pp. 380, 381). (Emphasis added.)

When a river is a boundary between two States, it is a natural boundary subject to gradual changes in the course of the river caused by accretion and erosion. This is the general rule and the rule recognized by this Court in *Handly,* in construing Kentucky's boundary on the Ohio. Citing the French civil authority Vattel, the Court stated:

> "In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."
>
> "If," says the same author, "the country which borders on a river has no other limits than the river itself, *it is in the number of territories that have natural or undetermined limits, and enjoys the right of alluvion.*" 18 U. S. at 379, 380 (Footnote omitted, Emphasis added.)

Furthermore, since the river was a natural boundary subject to the right of alluvion, the Court in *Handly* recognized that the states bounded thereby would be affected by accretion:

> Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed and land formed by the receding of the water. 18 U. S. at 380.

Thus, this Court has clearly ruled that when Virginia ceded the lands northwest of the river to the United States and made the river itself the boundary, she intended that boundary to be a natural, shifting and indeterminate line, subject to the forces of accretion and erosion.

D.

The Report Incorrectly Holds That *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), Is Controlling on the Issue in This Case.

The Report concludes that this Court's decisions in *Handly's Lessee* v. *Anthony*, 18 U. S. (5 Wheat.) 374 (1820), and *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), control this case and support the finding that the boundary is the low-water mark of 1792. To the contrary, *Handly* supports Kentucky's position that the river is a natural boundary, subject to the forces of accretion and erosion and that the boundary between the two states is the present low-water mark.

Indiana v. *Kentucky, supra,* is not determinative because it involved an avulsive change around a small segment of the river and not a determination of the entire boundary.

The dispute in *Indiana* v. *Kentucky,* arose over Green River Island, which at one time had been a true island, separated from the Indiana mainland by the channel of the Ohio River. The river gradually began to change its course so that the main channel flowed to the south of the island. The old channel bed gradually filled up and the island became attached to the Indiana mainland. Nevertheless, the Court found that the island still lay within the boundaries of Kentucky since the change in the Ohio River around the island had been an avulsive change, *i.e.,* a change in the bed or main channel of the river itself. The Court then had to determine as of what date the boundary should be fixed with respect to this area. The application of the avulsion exception or the so-called "island" rule was the only issue before the Court in this case. It would be improper and misleading to cite that case for any thing else. The highest court in Kentucky expressly recognized that the *Indiana* v. *Kentucky* case limited to its facts because it involved an application of the avulsion exception to the general rule. *Vaughn* v. *Foster,* 20 Ky. L. R. 682, 47 S. W. 333 (1898).

Generally, boundaries fixed from an avulsion are determined as of the day before the avulsion. However, in *Indiana* v. *Kentucky,* the change was a long time in coming and no one could determine precisely *when* the avulsion was complete. All that could be determined

was that the old channel had changed its course sometime during the period after Kentucky became a state in 1792 and before Indiana was admitted to statehood in 1816. Although the Court was not explicit in why it chose the date it did, it is clear that *some* choice had to be made which would not abnegate the rights of Kentucky. Thus, the 1792 date was the logical choice, for to choose the 1816 date would have deprived Kentucky of *any* rights to Green River Island, for at that time the Ohio was flowing to the south of the island:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana . . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. 136 U. S. at 508.

It is indisputable that under this traditional analysis the boundary between the states of Kentucky and Ohio cannot be the 1792 northerly low-water mark unless some avulsion has occurred which has affected

the *entire* course of the Ohio River. That is, unless the entire Ohio River has at some point changed its channel for a new and different one, the boundary between the two states follows the present day course of the river. And if such a dramatic event had at some point occurred, it is equally indisputable that some recordation of it would have been made. Kentucky has been unable to find any such record, nor does Ohio claim such occurred.

The only relevance of the 1792 line is that it was the boundary at the time Kentucky was admitted to the Union. In the absence of proof of an avulsive change (like Green River Island) at some point along the Ohio River the current northern low water mark of the river is the boundary between Kentucky and Ohio, subject to subsequent accretive changes.

E.

The Law of Accretion and Erosion Is Applied to Rivers Which Are Natural Boundaries as a Rule of Convenience.

There is a very sound and pragmatic basis for the application of the well-recognized rules of law affecting river boundaries. There are compelling reasons why a fixed line should not be adopted as the boundary between the two states. A static 1792 boundary line would be impossible to determine and impracticable to administer. It is a well known fact that the 1792 boundary line has been obscured over the passage of time. It would be unrealistic to attempt to fix a line as it *might* have existed in that year. Furthermore,

there is no rational basis to choose a 1792 boundary. Kentucky was admitted into the Union in 1792 with her 1789 boundaries. Surely if one were choosing a fixed line that had some reasonable relationship with the state involved, one would choose a date as of which a state's boundary was defined, not what that boundary was three years later. Or why not choose a 1784 boundary line? That was the date when Virginia ceded her land to the Union, so what were ultimately the boundaries of Kentucky were established at that point. Or why not use the north low water mark of the river as it existed in 1802 when Ohio was admitted to the Union? There is no logical reason to prefer one date over another; none of these ancient dates can possibly be correct, and especially not the 1792 date. The possibilities are numerous and absurd.

It was just such confusion that persuaded the Court to adopt the long-accepted traditional rule of accretion/erosion. As Chief Justice Marshall repeatedly emphasized in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), a rule of convenience *must* exist; otherwise, confusion reigns supreme. The Chief Justice mentions this rule of convenience not fewer than four times:

> This is a natural boundary, and in establishing it, Virginia must have had in view the *convenience* of the future population of the country. 18 U. S. at 379. (Emphasis supplied.)
>
> This rule [the rule of accretion/erosion] has been established by the common consent of mankind. It is founded on common *convenience.* Even when a state retains its dominion over a river

which constitutes the boundary between itself and another state, it would be extremely *inconvenient* to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this *inconvenience* is not less where the rising and falling is annual, than where it is diurnal. 18 U. S. at 380. (Emphasis supplied.)

All the *inconvenience* which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the states on its southeastern side, would result from attaching to Kentucky, the state on its southeastern border, a body of land lying northwest of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low water mark. 18 U. S. at 381. (Emphasis supplied.)

It would be as *inconvenient* to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last mentioned state, as it would be for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the state on the opposite shore. 18 U. S. at 383 (Emphasis supplied.)

Thus, the rule of convenience serves both the policies of encouragement or readily ascertainable boundaries and discouragement of boundary disputes and litigation. *See Purvine* v. *Hathaway,* 238 Ore. 60, 393 P. 2d 181 (1964).

F.

The Erection of Artificial Structures Including Locks and Dams Does Not Constitute an Avulsion and Does Not Alter Application of Principles of Accretion and Erosion.

The State of Ohio claims the construction of locks and dams along the Ohio River has caused a general increase in the level of the river and that this rise in the water level with its corresponding inundation of greater areas requires fixing of the boundary at the 1792 low water mark.[4] While Kentucky has acknowledged the possibility of changes in the width of the Ohio River caused by locks and dams, it has denied that such changes, if any, can now be located or that they were appreciable. There is nothing in the record to support any findings as to the nature or extent of any changes caused by the dams. However, even assuming an increase in the water level, it has long been established

---

[4]Kentucky denies this. In its answer before this Court Kentucky stated that:

> 3. Admits the allegation in paragraph 9 that the original dams and the new dams caused the waters of the Ohio River to rise and admits that in some places along the river the effect of this *may* have been to cover portions of the northerly shore, but Defendant does not have sufficient knowledge or information to form a belief as to the extent of any such inundation and denies that the dams caused the shores or banks of the river to be moved farther northerly to any appreciable extent, and denies that any such effect was manifested at all places along the river between the State of Ohio and Kentucky. [Emphasis supplied.]
>
> 4. Admits that the 1792 north low water mark has been obscured, and no one knows or can ascertain by any means where the line would run today, but denies that this situation was caused by and has existed only since the increase in elevation of the water levels due to erection of dams from 1910 to date.

that the mere fact that a change in the high-water mark of a river boundary has been brought about by artificial rather than natural means does not mean that that change is avulsive rather than accretive/erosive. Rather, the same basic test is used to determine if an avulsion has occurred, *i.e.,* whether the river has changed its channel. This is the rule which has been adopted by the federal courts.

The erecting of artificial structures, such as the dams and locks, does not alter the application of the accretion doctrine. *County of St. Clair* v. *Lovingston,* 90 U. S. (23 Wall.) 46, 50-66 (1874). unless, perhaps structures are erected for the specific purpose of causing the accretion. *Beaver* v. *United States,* 350 F. 2d 4 (9th Cir. 1965). *cert. denied,* 383 U. S. 937 (1966). *Accord, United States* v. *Claridge,* 416 F. 2d 933 (9th Cir. 1969), *cert. denied,* 397 U. S. 961 (1970); *Pollard's Lessee* v. *Hagan,* 44 U. S. 212 (1845); *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973).

For example, in *Bonelli, supra,* a dispute arose between the Bonelli Cattle Company and the State of Arizona over lands which had surfaced when the Colorado River withdrew as a result of federal rechannelling project. This Court applied federal common law to the situation and determined that the fact that the change came about through artificial means should have no effect on the outcome:

> The doctrine of accretion applies to changes in the river course due to artificial as well as natural causes. *County of St. Clair* v. *Lovingston, supra,* at 64-69, 23 L. Ed. 59 (1874); *United States* v.

> *Claridge,* 416 F. 2d 933 (CA9 1969), cert. denied, 397 U. S. 961, 25 L. Ed. 2d 253, 90 S. Ct. 994 (1970) (changes in the Colorado River's course, caused by the construction of Hoover Dam, are accretive). Where accretions to reparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof. 414 U. S. at 327.

Since the channelling was not avulsive (because the river had not changed its bed), the land in question belonged to the individual landowner. The determination that the changes in the Colorado River caused by the erection of the Hoover Dam, one of the most massive structures on earth, were accretive, was made on a full factual record. The Special Master here made his findings that the small dams on the Ohio were avulsive in nature on a record barren of facts. Certainly if it requires a full evidentiary hearing to determine the nature of the changes caused by Hoover Dam no less is necessary in this case.

Bonnelli relied upon the result and analysis in *United States* v. *Claridge,* which rejected the substantial changes wrought by construction of Hoover Dam as being avulsive and held such change to be accretive.

The *Bonelli* case has since been modified on the basis that it applied federal common law to a situation involving a river which was wholly *intra*state. *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U. S. 363 (1977). The *Corvallis* case, though, made it explicit that federal common law still applies in the case of an *inter*state boundary:

> If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. 429 U. S. at 375.

An application of the federal rule to the facts at hand can lead to only one conclusion—in the absence of affirmative proof to the contrary, no avulsion has occurred as a result of the construction by the federal government of the locks and dams on the Ohio River. The river has not, as a result of that construction, abandoned its old bed and sought a new one. A mere increase in the volume of water is not an avulsion and does not invoke the principles governing avulsion. *Purvine* v. *Hathaway,* 238 Ore. 60, 393 P. 2d 181 (1964).

In the *Purvine* case, the court dealt with a change in the Willamette River. The Willamette had earlier consisted of two branches joined by a body of water known as Hogue Creek. During a storm the east branch of the Willamette was almost entirely rechannelled into Hogue Creek. The east branch gradually dried up and Hogue Creek became the main branch of the Willamette River. It was obvious that the change to the east branch had been avulsive in nature; however, the issue before the court was whether the sudden increase in the size of Hogue Creek was avulsive. The plaintiffs were alleging that the change was avulsive and that the boundary between them and the defendant remained fixed as of the date of the storm. The court rejected this argument saying:

> But the principle of avulsion has not, as far as we have been able to ascertain, ever been applied when the sole change in the course of the stream involves simply an extension of its banks by the sudden influx of water. 393 P. 2d at 183.

The same general principles should likewise apply in the instant case. The dams along the Ohio were constructed by the federal government, not by the Commonwealth of Kentucky and certainly not for the purpose of encroachment upon Ohio territory. Their construction generated no change in the course of the Ohio River; no land masses were forcibly transferred from one side of the river to the other, nor did the river suddenly leave its bed. All that occurred was a mere increase in the volume of the water in the Ohio, and even that increase was neither sudden nor dramatic. In short, there is no authority under which construction of locks and dams on the Ohio can remove this case from the operation of the general rules of accretion and erosion.

II. LEGISLATIVE ACTS CONCLUSIVELY DEMONSTRATE THAT THE BOUNDARY BETWEEN KENTUCKY AND INDIANA IS THE CURRENT LOW WATER MARK ON THE NORTHERN SIDE OF THE OHIO RIVER; OHIO'S CLAIM, BASED ENTIRELY ON THE STATUS OF KENTUCKY'S BOUNDARY WITH INDIANA, MUST BE REJECTED AS A MATTER OF LAW.

The Report in its second part (pages 12-16) concludes that application of the principles of acquiescence and prescription bars Kentucky's claim that its north-

ern boundary is the current low water mark on the northerly side of the Ohio River as it exists at any given time. The Report bases this conclusion entirely on an isolated statement taken from a research "Informational Bulletin" prepared by the Kentucky Legislative Research Commission, a service agency for the Kentucky General Assembly, and on statements in an advisory opinion of an assistant attorney general of Kentucky. This conclusion must be rejected as a matter of law because public legislative acts of Indiana and Kentucky, approved by the Congress of the United States, conclusively establish the current low water mark on the northerly side of the Ohio River, as it exists at any given time, as the entire boundary between Indiana and Kentucky, with the exception of the Green River Island area where, due to avulsion, a channel filled up, and the boundary was surveyed and marked on dry ground.[5]

In March, 1942, the General Assembly of Kentucky adopted an act to establish the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement, 1942 Ky. Acts, Chapter 116. (Appendix to this brief, hereinafter appendix, pp. 35-36). The act recited that neither of the terminal points of

[5]It is difficult to conceive how the statements of individuals, even officers or employees of the State, in the documents referred to, could be valid evidence of acquiescence by the sovereign Commonwealth of Kentucky, especially on a stipulated submission on the pleadings solely on a question of law and without evidence. However, since the statements could not possibly effect the public acts of the two states which conclusively establish their boundary with the approval of Congress, whether the statements would otherwise have any weight whatsoever is not involved and need not be considered in this case.

the boundary line described in the Green River Island case, *Indiana* v. *Kentucky,* 163 U. S. 520 (1896), "reached the *low water mark* of the right side of the Ohio River, *forming the remainder of the boundary line* between said States," that the Governors of the two states "have appointed Commissioners to study said question for the purpose of ascertaining the true and legal boundary line thus in dispute," and that "said Commissioners have agreed upon the true and legal boundary line." (Emphasis added.) The act then provided that upon "enactment of a similar and reciprocal law by the State of Indiana and the approval and consent of the Congress of the United States of America to the compact thereby effected, the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows". The act then described the two lines necessary to connect the two terminal points to the "low water mark" and completed the description of the Indiana-Kentucky boundary upstream with the language "to the low water mark on the right side of the Ohio River and thence upstream at low water mark on the right side of said River," and completed the description of the Indiana-Kentucky boundary downstream with the language "to the low water mark on the right side of the Ohio River and thence downstream with said low water mark on the right side of said River." The Indiana General Assembly passed a like act. 1943 Ind. Acts, Ch. 2. The Congress of the United States then passed a joint resolution in 1943 reciting the actions of the Governors and commissioners and the passage of the Kentucky Act in 1942 and the

Indiana Act in 1943, and approved the boundary line as described in the acts. 57 Stat. 248 (1943) (Appendix, pp. 37-39).

No reference to any time or specific location concerning the low water mark upstream or the low water mark downstream was made in these legislative acts of the states or joint resolution of Congress. It is thus beyond cavil that Indiana and Kentucky through their legislatures confirmed that their entire boundary, except for that portion fixed by survey at Green River Island, is the low water mark on the northern side of the Ohio River at any given time, as affected by the processes of accretion and erosion. Obviously, it must remain that way unless and until changed by another compact.

It follows that the recommendation in the Report of the Special Master, based on the Kentucky-Indiana boundary, that the Kentucky-Ohio boundary be determined as the low water mark on the northerly side of the Ohio River as it existed in the year 1792, must be rejected.

CONCLUSION

The sole issue before this Court is one of law and is by what legal standard is the Ohio River boundary between Ohio and Kentucky to be determined.

There is no factual record in this case and obviously no evidence of avulsive changes having taken place. Thus, the reliance in the Report on the opinion of this Court in *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), is misplaced because that opinion was the so-called Island or avulsion exception to the general rule set

forth above. See *Vaughn* v. *Foster,* 20 Ky. L. R. 682, 47 S. W. 333 (Ky. 1898). The Island Exception has no bearing upon a case such as this which seeks to fix a boundary several hundred miles in length on a river which has made no avulsive change in course. This Court should follow the age-old rule that when a river itself is the boundary between two states, the low-water mark on one side, as it may fluctuate from time to time by accretion and erosion, is the boundary. This Court should enter a decree that the boundary between Ohio and Kentucky is the present northerly low-water mark of the Ohio River as it may exist at any given time as affected by accretion and erosion.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
Capitol Building
Frankfort, Kentucky 40601

JAMES M. RINGO
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Defendant

APPENDIX

APPENDIX

Kentucky Acts, 1942, Chapter 116:

AN ACT to establish the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement; to provide that the line so established shall become the boundary line upon the enactment of a similar and reciprocal law by the State of Indiana and the approval and consent to the compact thereby effected by the Congress of the United States of America.

WHEREAS, by decree of the Supreme Court of the United States in the case of Indiana v. Kentucky, decided May 18, 1896, and reported in 163 U. S. Reports the boundary line between the State of Indiana and the Commonwealth of Kentucky between certain terminal points therein described was fixed and established, and

WHEREAS, neither of said terminal points reached the low water mark of the right side of the Ohio River, forming the remainder of the boundary line between said States, and

WHEREAS, owing to the facts recited in the preceding literary paragraph hereof a dispute has arisen as to the boundary line connecting said terminal points with said low water mark, and

WHEREAS, the Governor of the State of Indiana and the Governor of the Commonwealth of Kentucky have appointed Commissioners to study said question for the purpose of ascertaining the true and legal boundry [sic] line thus in dispute, and

WHEREAS, said Commissioners have agreed upon the true and legal boundary line;

NOW THEREFORE,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That on and after the enactment of a similar and reciprocal law by the State of Indiana and the approval and consent of the Congress of the United States of America to the compact thereby effected, the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows, that is to say:

Commencing at a point on the line between Sections 15 and 14, Township 7 South, Range 10 West, and 67.25 chains South of the Northeast corner of Section 15, the same being the beginning point in the description of the part of the boundary line as fixed by the Supreme Court of the United States in Indiana v. Kentucky, decided May 18, 1896, and reported in 163 U. S. Reports thence south 0°, 53′ 15″ West to the low water mark on the right side of the Ohio River and thence upstream at low water mark on the right side of said River. Also beginning at the same beginning point to-wit: the beginning point in the description of the part of the boundary line between the State of Indiana and the Commonwealth of Kentucky as fixed by the Supreme Court in the cases above recited and following that line to the end of so much of said boundary line as was fixed by said decree; thence due West to the low water mark on the right side of the Ohio River and thence downstream with said low water mark on the right side of said River.

§ 2. Upon the enactment of a similar and reciprocal law by the State of Indiana, and the approval and consent of the Congress of the United States to the compact thereby effected, evidence thereof, together with the survey and report of the Commissioners by whom the boundary line was agreed upon, shall be filed in the office of the Secretary of State of Kentucky, and a copy thereof shall be filed in the office of the county court clerk of Henderson County, Kentucky.

Approved 9th March, 1942.

57 Stat. 248 (1943):

Joint Resolution giving the consent of the Congress to an agreement between the State of Indiana and the Commonwealth of Kentucky establishing a boundary between said State and said Commonwealth.

Whereas, by decree of the Supreme Court of the United States in the case of Indiana against Kentucky, decided May 18, 1896, and reported in 163 United States Reports, the boundary line between the State of Indiana and the Commonwealth of Kentucky between certain terminal points therein described was fixed and established; and

Whereas neither of said terminal points reached the low-water mark of the right side of the Ohio River forming the remainder of the boundary line between said State and said Commonwealth; and

Whereas, owing to the fact recited in the preceding literary paragraph hereof a dispute has arisen as to the boundary line connecting said terminal points with said low-water mark; and

Whereas the Governor of the State of Indiana and the Governor of the Commonwealth of Kentucky appointed commissioners to study said question for the purpose of ascertaining the true and legal boundary line thus in dispute; and

Whereas said commissioners agreed upon the true and legal boundary line; and

Whereas the General Assembly of the State of Indiana passed an act known and designated as Enrolled Act Number 19, House, bearing the signatures of Hobart Creighton, speaker of the house of representatives; Charles M. Dawson, president of the senate; and the signature and approval of Henry F. Schricker, Governor of Indiana, under date of January 29, 1943; and

Whereas the General Assembly of the Commonwealth of Kentucky passed a like act known and designated as House

Bill Numbered 375, bearing the signatures of Stanley S. Dickson, speaker of the house of representatives; Rodes K. Myers, president of the senate; and the signature and approval of Keen Johnson, Governor of Kentucky, under date of March 9, 1942; and

Whereas the said acts provided in substance that upon the approval and consent of the Congress of the United States the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows:

Commencing at a point on the line between sections 15 and 14, township 7 south, range 10 west, and sixty-seven and twenty-five one-hundredths chains south of the northeast corner of section 15, the same being the beginning point in the description of the part of the boundary line as fixed by the Supreme Court of the United States in Indiana against Kentucky, decided May 18, 1896, and reported in 163 United States Reports; thence south no degrees fifty-three minutes fifteen second west to the low-water mark on the right side of the Ohio River and thence upstream at low-water mark on the right side of said river. Also beginning at the same beginning point, to wit: The beginning point in the description of the part of the boundary line between the State of Indiana and the Commonwealth of Kentucky as fixed by the Supreme Court in the case above recited and following that line to the end of so much of said boundary line as was fixed by said decree; thence due west to the low-water mark on the right side of the Ohio River and thence downstream with said low-water mark on the right side of said river; and

Whereas the said acts of the State of Indiana and the Commonwealth of Kentucky constitute an agreement between said State and said Commonwealth establishing a boundary line between said State and said Commonwealth: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.

That the consent of the Congress is hereby given to such agreement and to the establishment of such boundary, and said acts of the State of Indiana and the Commonwealth of Kentucky are hereby approved.

Approved June 29, 1943.

IN THE

UNITED STATES SUPREME COURT

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Defendant.*

CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for defendant, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of April, 1979, I served three copies of the foregoing Exceptions of the Commonwealth of Kentucky to the Report of the Special Master filed January 22, 1979 and Brief in Support of Exceptions, by first class mail, postage prepaid, on the plaintiff, the State of Ohio, addressed to counsel for plaintiff, Honorable Michael R. Szolosi, 1st Asst. Atty. Gen., 30 E. Broad St., Columbus, Ohio 43215.

James M. Ringo

JAMES M. RINGO
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Defendant